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MAR 5 - 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In The Matter of)

Petition of the Telecommunications)
Resellers Association for a Declaratory)
Ruling That Voice Messaging Services are)
Telecommunications Services That Must be)
Made Available for Resale at Wholesale)
Rates Pursuant to Section 251(c)(4) of the)
Communications Act of 1934, as Amended)

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PETITION FOR DECLARATORY RULING
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, hereby seeks a declaratory ruling that incumbent local exchange carriers ("LECs") are required, pursuant to Section 251(c)(4) of the Communications Act of 1934, as amended ("Communications Act"), to make voice messaging services available for resale at wholesale rates.

Incumbent LEC voice messaging services provide for the transmission of information from the calling party to the incumbent LEC's voice mail unit, and ultimately to the called party. The message the called party receives when he or she retrieves his or her messages is the same message, in both form and content, as the message delivered to the voice mail unit by the calling party. Hence, voice messaging services are "telecommunications services," as that term is defined by Section 153(51) of the Communications Act. And because voice messaging services are "telecommunications services" offered at retail and often bundled with other telecommunications services, any restriction or condition imposed by incumbent LECs on their resale is presumptively unreasonable and in violation of the Section 251(c)(4).

Many incumbent LECs are currently either refusing to make voice messaging services available for resale to requesting telecommunications carriers or declining to offer such services at wholesale rates. While a number of State commissions have ruled that voice messaging services are telecommunications services that must be offered for resale at wholesale rates, other State commissions have declined to mandate the resale of voice messaging services. Yet other State

commissions, while requiring that voice messaging services be made available for resale, have not directed incumbent LECs to offer these services at wholesale rates. Establishment of federal interpretive guidelines, accordingly, is both necessary and appropriate to ensure full implementation of statutory resale obligations.

Given the growing demand for voice messaging services among both small business and residential users, as well as the unique attributes of incumbent LEC voice messaging offerings, the refusal of many incumbent LECs to make voice messaging services available for resale at wholesale rates has proven, and continues to prove, to be a significant impediment to entry for new market entrants, particularly small to mid-sized providers seeking to resell local service. Customers are understandably reluctant to switch to an alternative provider of local service if the change will cause them to lose, or diminish the quality of, their existing voice messaging service. The inability of new market entrants to provide a comparably feature-rich voice messaging offering at a comparable price thus places them at a significant competitive disadvantage *vis-a-vis* the incumbent LECs, essentially denying them competitive access to a significant segment of the user population.

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**PETITION FOR A DECLARATORY RULING
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, hereby respectfully seeks a declaratory ruling that incumbent local exchange carriers ("LECs") are required, pursuant

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless and internet services, as well as a variety of ancillary offerings. TRA's resale carrier members are also among the many new market entrants that are, or soon will be, offering local exchange and/or exchange access services. Indeed, roughly a third of TRA's resale carrier members currently resell, or are attempting to resell, local service in one or more markets.

to Section 251(c)(4) of the Communications Act of 1934 ("Communications Act"),² as amended by the Telecommunications Act of 1996 ("Telecommunications Act"),³ to make voice messaging services available for resale at wholesale rates.⁴

As TRA will discuss below, voice messaging services are "telecommunications services," as that term is defined by Section 153(51) of the Communications Act,⁵ and, therefore, must not only be made available for resale by incumbent LECs to requesting telecommunications carriers, but must be offered at wholesale rates. Many incumbent LECs are currently refusing either to make voice messaging services available for resale to requesting telecommunications carriers or to offer such services at wholesale rates. While a number of State commissions have ruled that voice messaging services are telecommunications services that must be offered for resale at wholesale rates, other State commissions have declined to mandate the resale of voice messaging services. Yet other State commissions, while requiring that voice messaging services be made available for resale, have not required incumbent LECs to offer these services at wholesale rates. Given the growing demand for voice messaging services among both small business and residential users, as well as the unique attributes of the voice messaging offerings of many incumbent LECs, the refusal of many incumbent LECs to make voice messaging services available for resale at wholesale rates

² 47 U.S.C. § 251(c)(4).

³ Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

⁴ For purposes of this Petition, voice messaging services include voice mail and all other voice storage and retrieval services provided by incumbent LECs.

⁵ 47 U.S.C. § 153 (51).

has proven, and continues to prove, to be a significant impediment to entry for new market entrants, particularly small to mid-sized providers seeking to resell local service.⁶

I. Voice Messaging Services Are Telecommunications Services Under The Communications Act

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁷ "Telecommunications," in turn, is defined by the Communications Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁸ Accordingly, in order to constitute a "telecommunications service," a service offering must involve the transmission for a fee of information without change in its form or content.

⁶ While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly-created enterprises, the "rank and file" of TRA's membership is still comprised of small to mid-sized carriers serving small to mid-sized businesses. The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of \$10 million and has in the neighborhood of 50 employees. Roughly 30 percent of TRA's members have been in business for less than three years and over 80 percent were founded less than a decade ago. While the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 35 percent of TRA's members generate revenues of \$5 million or less a year and less than 20 percent have reached the \$50 million revenue threshold. Additionally, nearly seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have workforces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. Source: TRA's "1997 Reseller Membership Survey & Statistics" (Oct. 1997).

⁷ 47 U.S.C. § 153 (51).

⁸ 47 U.S.C. § 153 (48).

Voice messaging service manifestly meets these basic statutory criteria. Incumbent LEC voice messaging service provides for the transmission of information from the calling party to the incumbent LEC's voice mail unit, and ultimately to the called party. The message the called party receives when he or she retrieves his or her messages is the same message, in both form and content, as the message delivered to the voice mail unit by the calling party. Hence, "information of the user's choosing" -- *i.e.*, the calling party's choosing -- is transmitted "between or among points specified by the user" -- *i.e.*, between the calling party and the voice mail unit and the called party -- "without change in the form or content of the information as sent and received." And, of course, voice messaging service is offered for a fee by incumbent LECs. As explained by the Florida Public Service Commission ("Florida PSC"):

Based on our interpretation of Sections 3 (51) and 3(48) of the Act, we believe that voice mail meets the definitions of "telecommunications" and "telecommunications service" under the Act. Voice mail is a transmission between or among points specified by the user. The transmitted information is of the sender's choosing and does not change in form or content when sent or received.⁹

⁹ MCI Telecommunications Corporation, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Florida PSC March 14, 1997), *recon.* Order No. PSC-97-1059-FOF-TP (released Sept. 9, 1997). *See also* Petition of MCI Metro Transmission Services for Arbitration of Interconnection Rates, Terms and Conditions with GTE Northwest Inc. Pursuant to 47 U.S.C. § 252(b), ARB 9, Order No. 97-038 (Oregon Public Utility Commission Feb. 3, 1997) (finding voice mail to be telecommunications service, even though it had been deregulated.); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service, Rulemaking No. 95-04-043, Investigation No. 95-04-044, Decision No. 97-08-059 (California Public Utilities Commission Aug. 1, 1997), *pet. for rehearing pending* ("LECs should remove resale restrictions on Voice Mail services from their tariffs."); Arbitration by the Public Service Commission of an Interconnection Agreement Between U S WEST Communications, Inc. and AT&T Communications of the Mountain States, Inc. Under 47 USC 252, Docket Nos. 70000-TF-96-319, 72000-TF-96-95 (Wyoming Public Service Commission April 23, 1997); Arbitration

[footnote continued on next page]

This statutory assessment is not altered by the Commission's long-standing classification of voice messaging service as an "enhanced service." The "basic/enhanced service" dichotomy was established in the *Second Computer Inquiry*, long before the passage of the Telecommunications Act.¹⁰ The Commission defined "basic service" as "the common carrier offering of 'pure transmission capability' for the movement of information 'over a communications

[footnote continued from preceding page]

Between AT&T Communications of the South Central States, Inc. and GTE Communications of the South, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 25704 (Alabama Public Service Commission Feb. 12, 1997); Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Case No. 96-440 (Kentucky Public Service Commission Feb. 4, 1997). TRA acknowledges that some States, such as Arizona, Illinois, North Carolina, Ohio, Virginia and Washington, have concluded that voice messaging services are not telecommunications services and, accordingly, need not be made available for resale at wholesale rates. TRA submits that the conflicting views of these various State Commissions argues for national resolution of this issue. As the Commission has recognized, national guidelines provide predictability, reduce delay, enhance efficiency, create economies of scale, lower transactional costs, and decrease administrative and regulatory burdens, particularly for smaller carriers which "are likely to have less of a financial cushion than larger entities." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 53 - 62 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997). The Commission's authority to identify services which must be made available for resale at wholesale rates has been confirmed by the U.S. Court of Appeals for the Eighth Circuit. Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Jan. 26, 1998)

¹⁰ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir. 1984), *cert denied sub nom. Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4, 1984).

path that is virtually transparent in terms of its interaction with customer-supplied information."¹¹

Indeed, the Commission made clear that "[i]n the provision of a basic transmission service, memory or storage within the network is used only to facilitate the transmission of the information from the origination to its destination and the carrier's basic transmission network is not used as an information storage system."¹² "Enhanced services" were deemed by the Commission to include "any offering over the telecommunications network which is more than a basic transmission service."¹³

The Commission has acknowledged, however, that Congress did "not utilize the Commission's basic/enhanced terminology . . . " in crafting the local telephony provisions of the Telecommunications Act.¹⁴ In fact, Congress defined "telecommunications services" far more

¹¹ Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services (Further Notice of Proposed Rulemaking), CC Docket No. 95-20, FCC 98-8, ¶ 39 (released Jan. 30, 1998), *citing* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 at ¶¶ 93 - 96.

¹² Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 at ¶ 95.

¹³ *Id.* at ¶ 97.

¹⁴ Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services (Further Notice of Proposed Rulemaking), CC Docket No. 95-20, FCC 98-8 at ¶ 39. As described by Senators Stevens and Burns in a recent letter to Chairman Kennard:

All of the central provisions of the Telecommunications Act are applicable to 'telecommunications carriers' and the provision of "telecommunications services." If these new definitions are construed very narrowly, as the recent decisions of the Commission indicate, then the "major overhaul" of the Communications Act that Congress expected from the Telecommunications Act could turn out to be nothing more than a footnote in history.

[footnote continued on following page]

broadly than "basic services."¹⁵ As discussed above, Congress, rather than limiting telecommunications services to "pure transmissions capability," expanded the category to include any transmission of information for a fee so long as the form and content of the information transmitted was not altered.¹⁶ Hence, while properly excluded from the Commission's "basic

[footnote continued from preceding page]

Our greatest concern is that the Commission continues to apply concepts developed in an inflexible, monopoly environment to the flexible, post-local-monopoly world that the Telecommunications Act was intended to create. The Commission's continued classification of services as "enhanced" or "basic" could seriously undermine the competitive regime Congress sought to create. . . . More to the point, the Telecommunications Act provided the Commission with the legal flexibility it previously lacked, making it unnecessary for the Commission to continue applying its outdated "enhanced/basic" regime.

Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Senators Stevens and Burns, dated January 27, 1998.

¹⁵ The Commission has called for public comment on differences between the pre-existing "basic services" category and the statutory definition of "telecommunications services." Thus, the Commission queried whether "Congress intended a significant departure from the Commission's usage of 'basic services.'" Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services (Further Notice of Proposed Rulemaking), CC Docket No. 95-20, FCC 98-8 at ¶ 41.

¹⁶ Notably, the Conference Report, while advising that the Telecommunications Act "defines 'information service' similar to the Federal Communications Commission's . . . definition of 'enhanced services,'" nowhere suggests that the Telecommunications Act's definition of "telecommunications" or "telecommunications services" was meant to mirror the Commission's definition of "basic services." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 114 - 16 (1996) ("Joint Explanatory Statement").

services" category, voice messaging services are clearly encompassed within the Communications Act's new definition of "telecommunications services."¹⁷

Nor is classification of voice messaging service as a "telecommunications services" undermined by the Telecommunications Act's treatment of either "telemessaging services" or "information services." "Telemessaging Services" include, among other things, "voice mail and voice storage and retrieval services." "Information services" encompass, among other things, "the offering of a capability for . . . storing . . . or making available information via telecommunications."¹⁸ The definition of neither "telemessaging services" nor "information services," however, excludes "telecommunications services." The former was defined simply to facilitate the imposition of additional safeguards on LEC provision of such services; the latter, while used more broadly, particularly in conjunction with Bell Operating Company activities, is not implicated by Sections 251 or 252. Hence, neither of these definitions acts as a limitation on the

¹⁷ Indeed, the Commission has referred to voice messaging services in other contexts as "telecommunications services." *See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, FCC 97-423, ¶ 86 (Jan. 13, 1998) ("telecommunications services may include . . . local and long-distance telephony along with voice mail, paging, calling cards, and other business services tailored to the particular needs of the building's tenants.").

¹⁸ 47 U.S.C. §§ 153 (41), 260(c). The Commission has concluded "that, although the text of the Commission's definition of 'enhanced services' differs from the [Telecommunications] Act's definition of 'information services,' the two terms should be interpreted to extend to the same functions" in order to provide "a measure of regulatory stability for telecommunications carriers and [information service providers]." *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services* (Further Notice of Proposed Rulemaking), CC Docket No. 95-20, FCC 98-8 at ¶ 40.

reach of the Telecommunications Act's definition of "telecommunications services."¹⁹ In other words, while the Commission drew a bright line between "basic services" and "enhanced services," under the Telecommunications Act individual services may fall into multiple categories.²⁰

¹⁹ Given that the Telecommunications Act's definition of "telecommunications services" is broad enough to encompass certain "information services," as defined by the Communications Act, application of the Commission's "contamination policy" is no longer appropriate in the "new regulatory regime." Under the Commission's contamination policy, a "basic service" which is combined with an "enhanced service" is said to be contaminated and hence the combined service is deemed to be an "enhanced service." See, e.g., Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service, 10 FCC Rcd. 13717, ¶ 18 (1995). Because the contamination policy, if applied to the resale obligations imposed by Section 251(c)(4), would relax these obligations, its use would conflict with the intent of Congress to fully open the local market to competition. As described by Senators Stevens and Burns:

The definitions [of "telecommunications service" and "information service"] are not mutually exclusive because Congress did not want to adopt the Commission's "contamination" theory . . . Language that specifically stated that a telecommunications service did not include an information service was struck before the final definitions were adopted.

Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Senators Stevens and Burns, dated January 27, 1998.

²⁰ As the Commission has recognized, certain "information services" incorporate as a "necessary bundled element" a "telecommunications transmission component." Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 115 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Dec. 23, 1997). TRA acknowledges that the Commission opined that the definition of enhanced services "appears not to include the provision of 'telecommunications services' in concluding that Section 251(c)(6), 47 U.S.C. § 251(c)(6) "does not require collocation of equipment necessary to provide enhanced services equipment." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 581, fn. 1416. While true with respect to many enhanced services, this broad-brush dicta does not accurately reflect the breadth of the Telecommunications Act's definition of "telecommunications services," particularly as it applies to voice messaging services.

The Florida PSC rejected claims that voice messaging service is not a "telecommunications service" either because it has been classified as an "enhanced service" or falls within the statutory definition of "telemessaging services."

The FCC's . . . ["classification of voice mail as an 'enhanced service'] was made prior to the enactment of the operative definitions used to establish resale obligations under the [Telecommunications] Act. Therefore, we believe that the requirements and definitions provided by the [Telecommunications] Act are the standards to be used in determining whether voice mail is subject to resale.²¹

Section 260 addresses the establishment of nondiscriminatory safeguards to protect other providers of telemessaging services from anticompetitive behavior by incumbent telecommunications providers. Its characterization of telemessaging to include voice mail is expressly limited to the provisions of that section, and it does not preclude the characterization of voice mail also as "telecommunications ."²²

The Minnesota Department of Public Service echoed this assessment:

Enhanced services fall under the broad statutory definition of telecommunications services offered to the incumbent's end users. Labeling these services as information services does not take them out of the statutory category which must be offered for resale.²³

²¹ MCI Telecommunications Corporation, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Florida PSC March 14, 1997).

²² MCI Telecommunications Corporation, Docket No. 961230-TP, Order No. PSC-97-1059-FOF-TP (released Sept. 9, 1997).

²³ Consolidated Petitions of AT&T of the Midwest, Inc. MCImetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S WEST Communications, Inc., Docket Nos. P-442, 421/M-96-855, 421/M-96-909, 421/M-96-729 (Minnesota DPS Dec. 2, 1996).

II. Incumbent LECs Are Required To Make Voice Messaging Services Available For Resale At Wholesale Rates

Section 251(c)(4) imposes on incumbent LECs the "duty . . . to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . . and . . . not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service."²⁴ The only exception to this obligation recognized by Section 251(c)(4) is a potential State-imposed limitation against reselling to a category of subscribers a telecommunications service available at retail only to a different category of subscribers.²⁵

Applying these statutory requirements, the Commission has mandated that incumbent LECs "must establish a wholesale rate for each retail service that (i) meets the statutory definition of a 'telecommunications service;' and (ii) is provided at retail to subscribers who are not 'telecommunications carriers.'"²⁶ Thus, the Commission declined to limit incumbent LECs' resale obligations to basic services.²⁷ And instead of enumerating all of the services that must be made available for resale, the Commission suggested that "State commissions, incumbent LECs, and

²⁴ 47 U.S.C. § 151(c)(4)(A), (B).

²⁵ 47 U.S.C. § 151(c)(4)(B).

²⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 871.

²⁷ Id.

resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs."²⁸

Exceptions to the statutory resale requirement recognized by the Commission were few in number. The Commission found that "[e]xchange access services are not subject to the resale requirements of section 251(c)(4)."²⁹ The Commission "establish[ed] a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers."³⁰ And the Commission, of course, concluded that "restrictions prohibiting . . . cross-class reselling of residential services are reasonable."³¹

Otherwise, the Commission "conclude[d] that resale restrictions are presumptively unreasonable."³² And while it acknowledged that this presumption could be rebutted, the Commission emphasized that a restriction would have to be narrowly tailored to pass statutory muster.³³ To this end, the Commission ruled that "bundled service offerings" and "promotional or discounted offerings, including contract and other customer-specific offerings" must be made

²⁸ Id. at ¶ 872.

²⁹ Id. at ¶ 873.

³⁰ Id. at ¶ 950.

³¹ Id. at ¶ 962.

³² Id. at ¶ 939.

³³ Id.

available for resale at wholesale rates."³⁴ As the Commission explained, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."³⁵ "In a competitive market," the Commission reasoned, "an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers."³⁶

As demonstrated above, voice messaging services are "telecommunications services" as that term is defined by the Telecommunications Act. Voice messaging services are offered at retail by virtually all, if not all, incumbent LECs. And voice messaging services are often bundled with other services. Any restriction or condition imposed by incumbent LECs on the resale of voice messaging service, accordingly, should be presumptively unreasonable and in violation of section 251(c)(4).

III. The Unavailability Of Voice Messaging Services Available For Resale At Wholesale Rates Has Proven, And Is Proving, To Be A Significant Impediment To Local Market Entry

Use of voice mail is pervasive in today's telecommunications market both among business and residential customers. While the majority of users still rely on home answering

³⁴ Id. at ¶ 877, 948; Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 ¶¶ 212 - 24 (released Dec. 24, 1997), *appeal pending sub nom. BellSouth Corporation v. FCC*, Case No. 98-1019 (D.C. Cir. Jan. 13, 1998); Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 98-231, FCC 98-17, ¶ 1 (released Feb. 4, 1998).

³⁵ Id. at ¶ 939.

³⁶ Id.

machines and in-house commercial voice mail systems, the percentage of residential and small business consumers using voice mail services provided by incumbent LECs is nonetheless substantial and, critically, is growing rapidly. One recent report found that the Bell Operating Companies ("BOCs") and GTE had achieved an average residential penetration rate for voice messaging services of roughly eleven percent, with SBC Communications, Inc. ("SBC") and U S WEST, Inc. ("U S WEST") reaching fourteen and eighteen percent penetration, respectively.³⁷ Moreover, the BOCs are expected to show a fifteen percent compounded annual growth rate in voice messaging services through the year 2000.³⁸ Indeed, the BOCs are projected to service 17.3 million voice mailboxes in the year 2000.³⁹ As one analyst explained:

Phone companies know that most people will have mailboxes. It's only logical that they want to be the phone company offering that mailbox, even if its free. . . . The mailbox ends up becoming a clearinghouse for other services that phone companies can end up charging a fee. If they don't control the mailbox, they lose the other services.⁴⁰

Data for individual companies is even more impressive. In 1996, BellSouth Corporation ("BellSouth") experienced a growth rate of twenty-two percent in voice mail

³⁷ Reingold, D., *et al.*, Merrill Lynch Capital Markets, The RBOCs & GTE: Telecom/ Services - Industry Report (Nov. 17, 1997); Brown Brothers Harriman & Co., Telecommunications Services - Industry Report (Nov. 28, 1997); U S WEST News Release: "U S WEST Communications Announces Solid Full-Year Financial Results; Highlights New Data, Wireless and Wireline Roll Outs" (Feb. 6, 1998).

³⁸ "Voice Mail Fuels Revenue for RHCs," Voice Technology & Services News, Vol. 16, No. 2 (Jan. 21, 1997).

³⁹ Id.

⁴⁰ Id.

subscribership, while U S WEST saw voice mail growth reach twenty-four percent.⁴¹ GTE's enhanced services revenues, including revenues derived from voice messaging services, rose by thirty percent in 1996, while U S WEST's revenues from value-added services such as voice messaging increased by sixty percent in this time frame.⁴² "[C]all management features, such as . . . voice mail . . . services" are "[i]ncreasingly important to . . . [Ameritech's] revenue mix" and "[l]eadership in the deployment of a modern infrastructure has facilitated the growth for Bell Atlantic of revenue from vertical services . . . [including] voice mail. . ."⁴³

While alternative providers of voice messaging service exist, the voice messaging services provided by the major incumbent LECs provide certain unique features and capabilities which differentiate the incumbent LECs' offerings. Chief among these differences is "stutter dial tone" which is generally available only through the incumbent LEC. "Stutter dial tone is a series of short separate tones produced by the . . . [incumbent LEC's] central switching office that alerts a

⁴¹ Reingold, D., *et al.*, Merrill Lynch Capital Markets, The RBOCs & GTE: Telecom/ Services - Industry Report (Nov. 17, 1997); BellSouth Corp. 1996 Report to Shareholders, "Seizing Opportunities for Growth (1997); "U S WEST Communications Net Income Rises 4.7%," Media Daily, Vol. 4, No. 5 (April 25, 1997).

⁴² Paine Webber, Inc., Telecommunications Services: Local Exchange - Industry Report (July 30, 1997).

⁴³ Brown Brothers Harriman & Co., Telecommunications Services - Industry Report (Nov. 28, 1997); Ameritech News Release: "Ameritech Earnings Per Share Up 12% in Fourth Quarter and Year, Before One-Time Items; Fifth Consecutive Year of Double-Digit Growth (Jan. 13, 1998) ("17% annual growth in sales of call management services such as Caller ID, call waiting and voice messaging."); Bell Atlantic News Release: "Bell Atlantic Announces Third Consecutive Year of Double-Digit Earnings Growth (1998) ("Revenues from Home Voice Mail and central-office-based services such as Call ID, Return Call and Call Waiting were approximately \$1.3 billion for the year, up 17.5 percent compared with 1996.").

voice mail subscriber that he or she has voice mail."⁴⁴ In the absence of stutter dial tone, a customer must place a call to his or her voice mail box to ascertain whether any messages are waiting. Also of consequence, incumbent LEC voice messaging generally offers far greater message storage capability, implicating both the number of messages that can be stored and the period of time for which individual messages can be stored, and expanded message length options. These latter enhancements generally derive from the substantially greater computer capacity maintained in incumbent LEC network systems.

Replicating the feature-rich incumbent LEC voice messaging service, much less replicating these services at a comparable price, is a virtual impossibility for resale carriers, particularly small to mid-sized providers. Simply to use the generally inferior offerings of alternative voice messaging providers, resale carriers generally must purchase call forwarding service from the incumbent LEC (often at a price comparable to the incumbent LEC's voice messaging service offering) just to route forwarded calls to an alternative provider's voice messaging platform.⁴⁵ In order to enhance its voice messaging offering, a competitive LEC would have to purchase or lease its own voice messaging platform, while to minimize its reliance upon the incumbent LEC, the competitive LEC would have to direct trunk traffic from every central office to its alternate voice messaging platform.

While these options certainly are theoretically available to small to mid-sized carriers, there is a huge gulf between the theoretically and the practically possible. A small to mid-sized

⁴⁴ Part 68 Waiver Request of Lucent Technologies, Inc. (Order), 12 FCC Rcd. 6015 (May 6, 1997).

⁴⁵ Of course, rendering it necessary for a customer to take voice messaging service apart from his or her local service is the antithesis of the movement toward single source providers that consumers have long been calling for.

provider is presented with a "Hobson's Choice" -- attempt to develop a voice messaging offering comparable to that provided by the incumbent LECs and invite financial ruin,⁴⁶ or offer an inferior service to their competitive detriment. As succinctly stated by the California Public Utilities Commission ("California PUC"):

Voice Mail is a highly technical product that may require a significant upfront investment from new entrants if they were forced to provide their own platform.⁴⁷

As the Commission has recognized, the Telecommunications Act directs it "to remove the existing operational barriers to entering the local market."⁴⁸ "[T]echnical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs" stand as significant operational barriers to entry.⁴⁹ "[E]limination of these obstacles is essential," the Commission has acknowledged, "if there is to be a fair opportunity to compete in the local exchange and exchange access markets."⁵⁰ As the Commission has repeatedly emphasized, to be competitively viable, new market entrants must be

⁴⁶ For example, a voice messaging platform sized to support 16 voice mail processing units with 24 port capacity would require an investment well in excess of \$1,000,000.

⁴⁷ Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service, Rulemaking No. 95-04-043, Investigation No. 95-04-044, Decision No. 97-08-059 (California Public Utilities Commission Aug. 1, 1997), *pet. for rehearing pending*.

⁴⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 16.

⁴⁹ Id.

⁵⁰ Id. at ¶ 18.

able to provide their customers with a level of not only functionality, but convenience, comparable to that available from the incumbent LECs.⁵¹

The inability of new market entrants to provide a comparably feature-rich voice messaging offering at a comparable price places them at a significant competitive disadvantage *vis-a-vis* the incumbent LECs, essentially denying them competitive access to a significant segment of the user population. As one analyst exclaimed, "[b]y not allowing resale of Voice Mail and Voice Messaging, the local service provider will have a competitive advantage over carriers that cannot afford to develop a redundant Voice Mail platform."⁵² The California PUC addressed the issue in a more matter of fact manner, characterizing voice messaging as a product "difficult to replicate" and concluding that failure to provide "equal access to these services for purposes of resale" will "thwart the development of resale-based competition in the near term."⁵³

Customers are understandably reluctant to switch to an alternative provider of local service if the change will cause them to lose, or diminish the quality of, their existing voice messaging service. Absent the ability to resell incumbent LEC voice messaging services, this is precisely the circumstance confronting new market entrants. Available alternative voice messaging services are generally lacking in comparable features and the provision of comparably feature-rich offerings is seldom an economically feasible option for small to mid-sized resale providers. Hence,

⁵¹ Id. at ¶¶ 16 - 18.

⁵² The Yankee Group, "Network-Based Services Enter the Spotlight," Consumer Communications, Vol. 13, Issue 101, Sec. 2.6 (Aug. 1996).

⁵³ Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service, Rulemaking No. 95-04-043, Investigation No. 95-04-044, Decision No. 97-08-059 (California Public Utilities Commission Aug. 1, 1997), *pet. for rehearing pending*

to the extent they are denied the right to resell incumbent LEC voice messaging services obtained at wholesale rates, resale carriers are effectively denied access to a key group of residential and business consumers.⁵⁴

IV. The Commission Has Recognized That Resale Is An Important Entry Option, Particularly For Small To Mid-Sized Carriers

The Telecommunications Act not only "contemplate[d] three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale," but required the Commission to "implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each."⁵⁵ Certainly, the Telecommunications Act "neither explicitly nor implicitly expresse[d] a preference for one particular entry strategy."⁵⁶ However, the Commission nonetheless acknowledged that resale would be "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."⁵⁷ Indeed, the Commission recognized that while resale would be "an important entry strategy . . . in the short term" for some new entrants "when they are building their own facilities," for others, especially small to mid-sized carriers, "the resale option . . . [would] remain an important entry strategy over

⁵⁴ Members have reported to TRA that they have had to turn away as many as twenty percent of new orders because they were unable to provide a voice messaging offering comparable to that provided by the incumbent LECs.

⁵⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 12.

⁵⁶ Id. at ¶ 12.

⁵⁷ Id. at ¶ 907.

the longer term."⁵⁸ Accordingly, the Commission committed to ensure that all three entry strategies proved viable through prompt and vigorous regulatory oversight.⁵⁹

The viability of local service resale has been drawn into significant question of late as both AT&T Corp. ("AT&T") and MCI Telecommunications Corp. ("MCI") have announced that they are abandoning resale as an entry option.⁶⁰ The Chairman of AT&T has referred to local resale as a "fool's errand."⁶¹ For his part, the President of MCI has referred to local resale as a "rat hole."⁶²

If local service resale proves to be unworkable, the benefits that should flow to consumers from local service competition will be further delayed. As Chairman Kennard recently emphasized, resale is the only one of the three entry options designed by Congress which allows for quick market entry. "[R]esale is the key to bringing immediate choice to residential customers."⁶³

Senator McCain recently declared that "[t]here's a need for entrepreneurial companies to make an effort to extend beyond business markets" in the provision of competitive local offerings⁶⁴ TRA's resale carrier members have been making just such an effort, seeking to provide

⁵⁸ Id.

⁵⁹ Id. at ¶¶ 12, 20.

⁶⁰ See, e.g., Rockwell, M., "Local Services Competition Isn't Hitting Home," InternetWeek (Feb. 2, 1998).

⁶¹ Gerwig, K. and Salamone, Salvatore, "Large Carriers Cite Own Facilities as Key to Local Competition," InternetWeek (Feb. 16, 1998).

⁶² "Kennard Targets Phone, Cable Competition in 'Very Ambitious' Agenda," Communications Daily (Feb. 2, 1998).

⁶³ Remarks by William E. Kennard, Chairman, Federal Communications Commission, delivered to the Practicing Law Institute on December 11, 1997.

⁶⁴ Rockwell, M., "Local Services Competition Isn't Hitting Home," InternetWeek (Feb. 2, 1998).

local service alternatives to both residential and small business users.⁶⁵ Their success, however, will depend in large part upon the Commission's fulfillment of its commitment to remove economic and operational impediments to local service resale.⁶⁶ Declaring voice messaging services to be "telecommunications services" which incumbent LECs must make available for resale at wholesale rates would certainly be an important step in this direction. To paraphrase the Commission, elimination of a resale restriction that "prevent[s] a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs . . . is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets."⁶⁷

⁶⁵ Indeed, some of TRA's resale carrier members, such as San Francisco, California-based Working Assets, have targeted the local residential market to the exclusion of business users.

⁶⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 12.

⁶⁷ Id. at ¶¶ 16, 18.

V. Conclusion

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to issue a declaratory ruling that voice messaging services are "telecommunications services,"⁶⁸ and, therefore, must not only be made available for resale by incumbent LECs to requesting telecommunications carriers, but must be offered at wholesale rates.

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⁶⁸ 47 U.S.C. § 153 (51).

CERTIFICATE OF SERVICE

I, Jeannine Greene-Massey, hereby certify that copies of the foregoing Petition for Declaratory Ruling was hand delivered this 5th day of March, 1998, to the following individuals:

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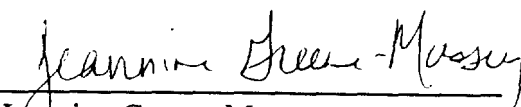
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